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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TONY HERNANDEZ, JR., Defendant and Appellant.	E063518 (Super.Ct.No. FWV1500055) OPINION

APPEAL from the Superior Court of San Bernardino County. Bridgid M. McCann, Judge. Affirmed as modified.

Helen S. Irza, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton, Deputy Attorney General, for Plaintiff and Respondent.

Pursuant to a plea agreement, defendant and appellant Tony Hernandez, Jr., pled no contest to assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4))[1] and vandalism (§ 594, subd. (b)(1)). Defendant also admitted that he had committed the vandalism offense for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (d)). In return, the remaining allegations were dismissed and defendant was placed on probation for a period of three years on various terms and conditions. On appeal, defendant challenges two of his probation conditions, claiming they are unconstitutionally vague and overbroad. For the reasons explained *post*, we modify probation condition No. 19. In all other respects, we affirm.

I

FACTUAL BACKGROUND[2]

On November 15, 2014, Upland Police Department officers responded to a report that defendant was yelling " 'Upland Ghost Town' " and threatening to kill residents in the area. The officers contacted defendant as he was drinking alcohol in his front yard. Defendant was uncooperative with the officers and a family member persuaded defendant to go inside the residence to prevent further disturbance.

Later, the officers were again dispatched to the area. Upon arrival, the officers contacted victim one. Victim one reported that when she looked out her window, she saw defendant holding a brick in his hand. When she walked outside, defendant began

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[1] All future statutory references are to the Penal Code unless otherwise stated.

[2] The factual background is taken from the probation officer's report.

yelling profanities at her and repeatedly yelled " 'Upland Ghost Town,' " before he threw the brick at her vehicle, damaging the car's windshield, hood, and rear license plate. Victim one noted that there was a lot of gang activity in the area.

The officers arrested defendant and took him into custody. After he waived his constitutional rights, defendant said that he had been drinking. He denied breaking victim one's windshield or being a member of Upland Ghost Town. He, however, admitted that he was in the gang five years prior.

On January 5, 2015, officers were again dispatched to the area in reference to a disturbance. Upon arrival, victim two reported that defendant had driven by his residence and shouted " 'Fat Ass.' " Shortly thereafter, defendant walked down the street and threatened to kill victim two and his family. Defendant continued walking, but returned carrying a bat or a large piece of wood. Defendant then picked up a rock and threw it at victim two's house. The rock landed on victim two's porch, nearly striking victim three. Defendant yelled, " 'This is my street' " and " 'I hope the cops come before I get you.' " Victim three gave a similar statement. Victim three knew defendant to be gang-affiliated. Victim four also heard defendant threatening to kill everybody and saw defendant striking trash cans with a bat.

Officers tried to contact defendant but he failed to comply with the officers' directives. Defendant eventually cooperated and apologized. Defendant was arrested and taken into custody. After he waived his constitutional rights, defendant denied doing anything wrong and claimed it was his friend " 'Bobbo.' " He also denied yelling at the

victim, having a bat, or assaulting anyone with a rock. Defendant admitted being a member of Upland Ghost Town and stated he had tattoos representing his gang.[3]

II

DISCUSSION

At the time defendant was placed on probation, the trial court ordered defendant, among other things, to "[n]ot associate with persons known to [him] to be gang members or frequent places of known gang activity." (Condition No. 19) The court also ordered him to "[s]ubmit to and cooperate in a field interview by any peace officer at any time of the day or night." (Condition No. 22)

Defendant contends these probation conditions impermissibly infringe upon a host of constitutional rights. Specifically, he claims condition No. 19 is unconstitutionally vague and infringes on his rights to travel and association. He also asserts condition No. 22 is unconstitutionally overbroad and vague and it infringes on his rights against self-incrimination.

"A Court of Appeal may review the constitutionality of a probation condition, even when it has not been challenged in the trial court, if the question can be resolved as a matter of law without reference to the sentencing record. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888-889 (*Sheena K.*).) Our review of such a question is de novo." (*People v. Pirali* (2013) 217 Cal.App.4th 1341, 1345.)

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[3] During a later interview with the probation officer, defendant denied any past or present affiliation or membership with Upland Ghost Town.

While a probationer does not surrender all constitutional rights, it is well settled that "probation is a privilege and not a right" (*People v. Olguin* (2008) 45 Cal.4th 375, 384 (*Olguin*)) and "[i]nherent in the very nature of probation is that probationers 'do not enjoy "the absolute liberty to which every citizen is entitled." ' [Citation.]" (*United States v. Knights* (2001) 534 U.S. 112, 119.) Reasonable probation conditions may infringe upon constitutional rights provided they are narrowly tailored to achieve legitimate purposes. (See *Olguin*, *supra*, at p. 384; *Sheena K.*, *supra*, 40 Cal.4th at p. 890.) "A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad. [Citation.]" (*Sheena K.*, *supra*, at p. 890.)

Further, "[a] probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a [constitutional] challenge on the ground of vagueness. [Citation.]" (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) "[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' " (*Ibid*.) That is, the defendant must know in advance when he may be in violation of the condition. "[T]he law has no legitimate interest in punishing an innocent citizen who has no knowledge of the presence of a [prohibited item]." (*People v. Freitas* (2009) 179 Cal.App.4th 747, 752 [modifying probation condition to prohibit knowing possession of a firearm or ammunition].) Accordingly, courts have consistently ordered modification of probation conditions to incorporate a scienter requirement when a probationer could unknowingly

engage in a prohibited activity. (See *In re Victor L.* (2010) 182 Cal.App.4th 902, 912-913 (*Victor L.*); *In re Justin S.* (2001) 93 Cal.App.4th 811, 816; *People v. Lopez* (1998) 66 Cal.App.4th 615, 629.)

A. *Condition No. 19*

Defendant challenges the probation condition that prohibits him from "frequent[ing] places of known gang activity." He insists that the words "frequent" and "gang activity" have such an uncertain meaning that the condition must be deemed unconstitutional. The People believe this condition should be modified to prohibit defendant from "visiting" any places known to him to be a place of gang activity. We agree that the condition must be modified by inserting an explicit knowledge requirement. (See *Sheena K.*, *supra*, 40 Cal.4th at pp. 891-892.)

Potential vagueness problems arise from the use of the verb "frequent" with respect to defendant because the word creates an ambiguity as to whether defendant is permitted to visit those areas occasionally. (See American Heritage Dict. (1969) p. 526 ["frequent" commonly means "[o]ccurring or appearing quite often or at close intervals"; "To pay frequent visits to; be in or at often."]) In *People v. Leon* (2010) 181 Cal.App.4th 943 (*Leon*), the Court of Appeal cured a vague probation condition that instructed the probationer " 'not to frequent any areas of gang-related activity' " by modifying it to require the probationer " 'not to visit or remain in any specific location which you know to be or which the probation officer informs you is an area of criminal-street-gang-related activity.' " (*Id.* at p. 952.) By requiring that the probationer know a location was in the

prohibited category instead of that he knowingly "visit or remain" in a prohibited location, the modification cured the condition's vagueness by giving clearer notice of the places the probationer needed to avoid. (*Ibid.*)

Similarly, in *In re H.C.* (2009) 175 Cal.App.4th 1067, a minor challenged a probation condition requiring that he " 'not frequent any areas of gang related activity. . . .' " (*Id.* at p. 1072.) The court explained that "frequent" in verb form was no longer commonly used and "would be especially challenging to understand" in this context. (*Ibid.*) The court further determined that "[u]nderstanding the phraseology of 'frequent' to mean 'being in areas of gang-related activity' suggests more than one issue of interpretation. An area with 'gang-related activity' might be, in some instances, an entire district or town. It would be altogether preferable to name the actual geographic area that would be prohibited to the minor and then to except from that certain kinds of travel, that is, to school or to work. At the very least the condition . . . should be revised to say that the minor not *visit* any area *known* to him to be a *place of gang-related activity*." (*Ibid.*, italics added.)

Victor L., supra, 182 Cal.App.4th 902 went a step further. In that case, the court considered a condition in which the defendant was ordered to stay away from " 'areas known by [him] for gang-related activity.' " (*Id.* at p. 913, fn. omitted.) The court held that, "*even with a knowledge requirement,* the gang-related activities condition is impermissibly vague in that it does not provide notice of what areas he may not frequent or what types of activities he must shun." (*Id.* at p. 914, italics added.) "The ambiguity

of the chosen language conjures up divergent possible definitions of the term 'gang-related activity,' and reasonable minds may differ as to precisely which 'areas' would come within the condition's purview." (*Id*. at p. 916.) Because the probation officer is in a better position than the juvenile court to identify the forbidden areas, the *Victor L*. court modified the condition to prohibit the minor's presence in "areas known by [him] for gang-related activity (or specified by his probation officer as involving gang-related activity)." (*Id*. at pp. 918-919, 931-932, italics omitted.) Accordingly, we will similarly modify defendant's probation condition No. 19 to read, "Not associate with persons known to you [defendant] to be criminal street gang members or visit or remain in any area which you know to be, or which the probation officer informs you, is an area of criminal street gang-related activity." (See *Leon*, *supra*, 181 Cal.App.4th at p. 952; *In re H.C.*, *supra*, 175 Cal.App.4th at p. 1072; *Victor L.*, *supra*, 182 Cal.App.4th at pp. 918, 931-932.)

B. *Condition No. 22*

Defendant also challenges the probation condition requiring him to "[s]ubmit to and cooperate in a field interview by any peace officer at any time," claiming it is unconstitutionally vague and overbroad and infringes on his Fifth Amendment right against self-incrimination. We conclude the trial court properly imposed probation condition No. 22.

Pursuant to section 1203.1, "the sentencing court has broad discretion to prescribe reasonable probation conditions to foster rehabilitation and to protect the public so justice

may be done." (*People v. Miller* (1989) 208 Cal.App.3d 1311, 1314 (*Miller*).) While a probationer retains rights of privacy and liberty under the federal Constitution (*People v. Keller* (1978) 76 Cal.App.3d 827, 832, overruled on other grounds in *People v. Welch* (1993) 5 Cal.4th 228, 237), probation conditions may nevertheless place limits on constitutional rights if necessary to meet the goals of probation (*People v. Bauer* (1989) 211 Cal.App.3d 937, 940-941). Furthermore, "[a] condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' " (*People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*).)

Like the standard probation search condition, a field interrogation probation condition is a correctional tool that can be used to determine whether the defendant is complying with the terms of his probation or disobeying the law. (See *People v. Reyes* (1998) 19 Cal.4th 743, 752.) The threat of an unexpected interrogation is fully consistent with the deterrent purposes of the field interrogation condition. (*Ibid*.)

In *People v. Adams* (1990) 224 Cal.App.3d 705, we stated that "a warrantless search condition is intended and does enable a probation officer ' "to ascertain whether [the defendant] is complying with the terms of probation; to determine not only whether [the defendant] disobeys the law, but also whether he obeys the law. Information obtained . . . would afford a valuable measure of the effectiveness of the supervision given the defendant and his amenability to rehabilitation." ' [Citation.]" (*Id.* at p. 712.)

In addition, the California Supreme Court stated, "[w]hen [warrantless search and seizure] conditions are imposed upon a probationer . . . it is established that the individual 'consents to the waiver of his Fourth Amendment rights in exchange for the opportunity to avoid service of a state prison term. Probation is not a right, but a privilege.' [Citation.]" (*In re York* (1995) 9 Cal.4th 1133, 1150, quoting *People v. Bravo* (1987) 43 Cal.3d 600, 608.)

Here, defendant's field interrogation probation condition will provide practical, on-the-street supervision of him. A field interrogation will be useful to monitor defendant's compliance with his other probation conditions. Also, information obtained from field interrogations will provide a valuable measure of his amenability to rehabilitation, which is related to his future criminality. In other words, the condition provides officers with a means of assessing defendant's progress toward rehabilitation, it assists them in enforcing other terms of his probation, and it deters further criminal activity. Thus, the field interrogation probation condition serves the purposes of probation and is valid under the *Lent* criteria. (*Lent*, *supra*, 15 Cal.3d at p. 486.)

Furthermore, the condition is not vague or overbroad. A probation term should be given "the meaning that would appear to a reasonable, objective reader." (*People v. Bravo*, *supra*, 43 Cal.3d at p. 606.) Nothing in the context in which the language of the probation condition appears suggests that any meaning, other than the ordinary, usual one applies. The language used is plain and simple. That is, a "field" interrogation is contrasted with a "custodial" interrogation at the station house. "Interview" is commonly

and ordinarily understood to mean questioning or inquiry. The requirement that a probationer "submit" to a field interrogation means that the probationer has no right to avoid or run away from the encounter. "Cooperation" in "interview," or questioning, logically means that the probationer must answer the officer's questions.

Moreover, while probationers have long been required to "cooperate" with their probation officers, a probationer is not foreclosed from asserting his Fifth Amendment privilege, and it would not be inherently uncooperative for him to assert that privilege. (See *U.S. v. Davis* (1st Cir. 2001) 242 F.3d 49, 52 [finding no realistic threat in a requirement to cooperate with the probation officer].) Therefore, although defendant must cooperate with the police, he retains the right to assert the Fifth Amendment, and his probation cannot be revoked based on a valid exercise of that right. (*Minnesota v. Murphy* (1984) 465 U.S. 420, 427, 434 (*Murphy*).) In *Murphy*, the Supreme Court explained that if a state attaches "[t]he threat of punishment for reliance on the privilege" against self-incrimination by asserting either "expressly or by implication . . . that invocation of the privilege would lead to revocation of probation . . . the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution." (*Id*. at p. 435.) However, defendant's probation condition contains no such threat. It would not be inherently uncooperative for defendant to assert the Fifth Amendment; defendant could still follow instructions and answer nonincriminating questions. (See *Davis*, *supra*, 242 F.3d at p. 52.)

The defendant in *Miller*, *supra*, 208 Cal.App.3d at p. 1315, who was required to submit to polygraph testing at the direction of his probation officer as a condition of probation, also argued that the condition violated his privilege against self-incrimination. The *Miller* court stated: "Defendant misconstrues the nature of the privilege. The privilege against self-incrimination is not self-executing; it must be claimed. [Citation.] Although defendant has a duty to answer the polygraph examiner's questions truthfully, unless he invokes the privilege, shows a realistic threat of self-incrimination and nevertheless is required to answer, no violation of his right against self-incrimination is suffered. [Citation.] The mere requirement of taking the test in itself is insufficient to constitute an infringement of the privilege." (*Ibid*.)

Notwithstanding the above, defendant relies on *United States v. Saechao* (9th Cir. 2005) 418 F.3d 1073 (*Saechao*) to support his argument. *Saechao*, however, is distinguishable. In *Saechao*, the court distinguished the facts in that case from the holding in *Murphy*. (*Id.* at p. 1078.) In *Murphy*, the United States Supreme Court held that the probation condition that a defendant "be truthful with his probation officer in all matters" was constitutional because it only proscribed false statements. (*Murphy*, *supra*, 465 U.S. at p. 436.) There was nothing in the probation condition that compelled the defendant to answer all questions; the defendant was only required to be truthful if he chose to answer his probation officer's questions. (*Ibid*.)

In contrast, the probation condition in *Saechao* explicitly stated that defendant must " 'promptly and truthfully *answer all* reasonable inquiries' " during a field

interrogation. (*Saechao, supra,* 418 F.3d at p. 1075, italics added.) The Ninth Circuit held that this probation condition was unconstitutional because, "[n]ot only was [the defendant] required to be truthful to his probation officers, but he was expressly required, under penalty of revocation, to 'promptly . . . answer all reasonable inquiries.' " (*Id*. at p. 1078, italics omitted.) The court held that this condition violated the Fifth Amendment because, unlike the condition in *Murphy*, the probationer was not permitted to invoke the privilege against self-incrimination without jeopardizing his supervised release. (*Ibid*.)

Here, defendant is not subject to a condition like the one found impermissible in *Saechao* requiring him to answer all reasonable inquiries; he is not even subject to a condition like the one found permissible in *Murphy* requiring him to be truthful in all matters. Defendant is required only to submit to and cooperate in a field interview by law enforcement. If asked a question the answer to which is likely to incriminate him, he is free to invoke his Fifth Amendment privilege and refuse to respond. Thus, the inherent meaning of the term limits the questions that could be asked of a probationer in a field interrogation to those designed to monitor the probationer's compliance with the other terms of his or her probation as well as future criminality. We do not find that the failure to make this limitation explicit provides any justification for striking the condition. It may be that this limitation is implicit in the language that the court adopted and could be permitted to stand without modifying the language of the condition. Moreover, it is unlikely that a probationer would likely be found to have violated the field interrogation

term in a probation revocation hearing for merely refusing to answer questions unrelated to the conduct of the probationer.

In summary, we note that the limitation on defendant's liberty is warranted due to his status as a felon. The condition is sufficiently narrow to serve the interests of the state, i.e., his reform and rehabilitation, while requiring him merely to submit to and cooperate in a field interview. In these circumstances, we conclude that the probation condition is valid.

III

DISPOSITION

Probation condition No. 19 is modified to state: "Not associate with persons known to you [defendant] to be criminal street gang members or visit or remain in any area which you know to be, or which the probation officer informs you, is an area of criminal street gang-related activity."

As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

CODRINGTON
J.